No. 94-152

FILED
AUG 31 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

DAVID C. OTIS, et al.,

v. *Petitioners,*

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

DAN R. MENTOR, et al.,

v. *Petitioners,*

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

CLIFFORD H. GILDEA, et al.,

v. *Petitioners,*

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Iowa Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DO THE RAILWAY LABOR ACT, 45 U.S.C. § 151, ET SEQ., AND THE FEDERAL RAIL SAFETY ACT OF 1970, 45 U.S.C. § 421, ET SEQ., INDIVIDUALLY OR WHEN READ TOGETHER, PREEMPT ENFORCEMENT AGAINST RESPONDENT OF IOWA CODE § 730.5, WHICH MANDATES LESS STRINGENT DRUG TESTING FOR EMPLOYEES THAN DO THE RESPONDENT RAILROAD'S WORK RULES?

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED BUT NOT SET OUT FULLY IN THE PETITION

The United States Constitution, Article I, Section 8:

> The Congress shall have the power . . . to regulate commerce with foreign nations; among the several States, and with the Indian Tribes . . .

45 U.S.C. § 431(a):

> Sec. 431. Promulgation of rules, regulations, orders, and standards.
>
> (A) Authority of Secretary; collective bargaining agreements under Railway Labor Act as consistent with rules, etc.
>
> The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provision of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety. However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act [45 U.S.C.A. Sec. 151, *et seq.*], including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be construed to give the Secretary authority to issue rules, regulations, orders, and standards relating to qualifications or employees, except such qualifications as are specifically related to safety.

45 U.S.C. § 434:

> Section 434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation.
>
> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent

practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 153(i):

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 153(q):

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment board. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it

may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

Iowa Code § 730.5:

2. Except as provided in subsection 7, an employer shall not require or request employees of applicants for employment to submit to a drug test as a condition of employment, preemployment, promotion, or change in status of employment. An employment shall not request, require, or conduct random or blanket drug testing of employees . . .

3. This section does not prohibit an employer from requiring a specific employee to submit to a drug test if all of the following conditions are met:

a. The employer has probable cause to believe that an employee's faculties are impaired on the job.

b. The employee is in a position where, such impairment presents a danger to the safety of the employee, another employee, a member of the public, or the property of the employer, or when impairment due to the effects of a controlled substance is a violation of a known rule of the employer.

c. The test sample withdrawn from the employee is analyzed by a laboratory or testing facility that has been approved under rules adopted by the department of public health.

d. If a test is conducted and the results indicate that the employee is under the influence of alcohol or a controlled substance or indicate the presence of alcohol or a controlled substance, a second test using an alternative method of analysis shall be conducted. When possible and practical, the second test shall use a portion of the

same test sample withdrawn from the employee for use in the first test.

e. An employee shall be accorded a reasonable opportunity to rebut or explain the results of a drug test.

f. The employer shall provide substance abuse evaluation, and treatment if recommended by the evaluation, with costs apportioned as provided under the employee benefit plan or at employer expense, if there is no employee benefit plan, the first time an employee's drug test indicates the presence of alcohol or a controlled substance. An employer shall take no disciplinary action against an employee due to the employee's drug involvement the first time the employee's drug test indicates the presence of alcohol or a controlled substance if the employee undergoes a substance abuse evaluation, and if the employee successfully completes substance abuse treatment if treatment is recommended by the evaluation. However, if an employee fails to undergo substance abuse evaluation when required under the results of a drug test, or fails to successfully complete substance abuse evaluation when required under the results of a drug test, or fails to successfully complete substance abuse treatment when recommended by an evaluation, the employee may be disciplined up to and including discharge. The substance abuse evaluation and treatment provided by the employer shall take place under a program approved by the department of public health or accredited by the joint commission on accreditation of hospitals . . .

* * *

7. A drug test conducted as a part of a physical examination performed as a part of a preemployment physical or as a part of a regularly scheduled physical is only permissible under the following circumstances:

a. For a preemployment physical, the employer shall include notice that a drug test will be part of a preemployment physical in any notice or advertisement soliciting applicants for employment or in the application for employment, and an applicant for employment shall be personally informed of the requirement for a drug test at the first interview.

b. For a regularly scheduled physical, the employer shall give notice that a drug test will be part of the physical at least thirty days prior to the date the physical is scheduled.

Drug testing conducted under this subsection shall conform to the requirements of subsection 3, paragraphs "c", "d", "e", and "f"; however, paragraph "f" shall not apply to drug tests conducted as a part of a preemployment physical . . .

* * *

9. This section may be enforced through a civil action.

a. A person who violates this section or who aids in the violation of this section is liable to an aggrieved employee or applicant for employment for affirmative relief including reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate including attorney fees and court costs.

b. When a person commits, is committing, or proposes to commit, an act in violation of this section, an injunction may be granted through an action in district court to prohibit the person from continuing such acts. The action for injunctive relief may be brought by an aggrieved employee or applicant for employment, the county attorney, or the attorney general.

In an action brought under this subsection alleging that an employer has required or requested a drug test in violation of this section, the employer has the burden of proving that the requirements of this section were met . . .

* * *

11. A person who violates this section is, upon conviction, guilty of a simple misdemeanor.

59 CFR Ch. II, Subpart D, 209.301 and 209.303:

209.301

(a) This subpart prescribes the rules of practice for administrative proceedings relating to the determination of an individual's fitness for performing safety-sensitive functions under 209(f) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 438(f)).

(b) The purpose of this subpart is to prevent accidents and casualties in railroad operations that result from the presence in the work force of railroad employees, including managers and supervisors, and agents of railroads who have demonstrated their unfitness to perform the safety-sensitive functions described in 209.303 by violating any rule, regulation, order or standard prescribed by FRA. Employees and agents who evidence such unfitness may be disqualified, under specified terms and conditions, temporarily or permanently, from performing such safety-sensitive functions.

(c) This subpart does not preempt a railroad from initiating disciplinary proceedings and imposing disciplinary sanctions against its employees, including managers and supervisors, under its collective bargaining agreements or in the normal and customary manner. Disqualification determinations made under the subpart shall have no effect on prior or subsequent disciplinary actions taken against such employees by railroads.

209.303 coverage.

(a) Railroad employees who are assigned to perform service subject to the Hours of Service Act (45 U.S.C. 61-64b) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service.

(b) Railroad employees or agents who:

(1) Inspect, install, repair or maintain track and roadbed;

(2) Inspect, repair or maintain locomotives, passenger cars, and freight cars;

(3) Conduct training and testing of employees when the training or testing is required by the FRA's safety regulations; or

(c) Railroad managers, supervisors or agents when they:

(1) Perform the safety-sensitive functions listed in paragraphs (a) and (b) of this section;

(2) Supervise and otherwise direct the performances of the safety-sensitive functions listed in paragraphs (a) and (b) of this section; or

(3) Are in a position to direct the commission of violations of any of the requirements of parts 213 through 236 of this title.

STATEMENT OF THE CONSOLIDATED CASES

These three consolidated civil actions arose when Appellee Chicago and North Western Transportation Company ("CNW") conducted drug screening in accordance with its work and safety rules, and Appellants Brotherhood of Maintenance of Way Employees ("BMWE") and employees Otis, Ewoldt, Cook, Halladay, Menter, Smith, Waldeier, Gildea and Scarberry filed actions in the Iowa District Court for Cerro Gordo County alleging the CNW violated § 730.5, Code of Iowa.

After Answers were filed by CNW and limited discovery was conducted, the cases were consolidated and submitted for decision to the Iowa District Court upon cross motions for summary judgment. The Iowa District Court ruled on December 4, 1992 that it lacked subject matter jurisdiction over these cases because the Railway Labor Act ("RLA"), 45 U.S.C. 151, et seq., preempts § 730.5, Code of Iowa.

Set out below are ¶¶ 1-13 of the Iowa District Court's "undisputed relevant material facts (District Court Ruling pp. 2-8, Petitioner's App. 17-24):

> 1. The individual plaintiffs herein are employees of defendant railroad and members of plaintiff, Brotherhood of Maintenance of Way Employees Chicago and North Western Systems Federation ("BMWE"). BMWE is a railway labor organization which is a 'representative' of 'employees' within the meaning of the Railway Labor Act, 45 U.S.C. Section 151. Its members are employed in the track, bridge and building, water supply, construction, fuel departments, and shops on the defendant's railroad system. The BMWE acts on its own behalf and on behalf of the employees of defendant whom they represent.
>
> 2. Defendant, Chicago and North Western Transportation Company ("CNW"), is a corporation engaged in the business of owning, maintaining and operating a line and system or railroad which extend in part through Mason City, Cerro Gordo County, Iowa.

3. The Hours of Service Act, 45 U.S.C. Section 61 et seq. as implemented by 49 C.F.R. 209, 213-29, and 231-36, does not apply to plaintiffs because they are Maintenance of Way Employees. Maintenance of Way Employees occupy safety sensitive positions as designated by the Federal Railway Administration.

4. Plaintiffs Otis, Ewoldt, Cook and Hallady are employed seasonally by defendant and maintain their employment status as furloughed employees until they are summoned back to work as active employees by defendant.

5. Plaintiffs Otis, Ewoldt, Cook and Hallady were required to pass a medical department examination prior to being returned to service from furlough status. They were not disciplined for rule violations. These employees were furloughed and submitted applications for positions bulletined on March 5, 1991, to be effective April 1, 1991. Each was required to take a urine drug screen in connection with the medical department's policy on return to service physical examinations. Following the medical department's receipt of the drug screen results, plaintiffs were returned to service as follows: Cook on April 8, 1991; Ewoldt on April 9, 1991; Otis, April 15, 1991; and Hallady, April 8, 1991. Each of these plaintiffs are claiming damages for the time lost between April 1, 1991, and the date returned to service.

6. On June 2, 1989, plaintiffs Menter and Smith, Maintenance of Way Employees, were dismissed from their jobs by defendant on the basis that the plaintiffs' required drug test results were positive for the presence of prohibited substances which defendant claims violated Rule G.

7. Plaintiffs Waldeier, Gildea and Scarberry Maintenance of Way Employees, face disciplinary procedures to be conducted by defendant pertaining to defendant's requirement that said employees submit to a breathalyzer test for alcohol.

8. Plaintiffs have all submitted grievances pursuant to the Federal Railway Labor Act and are

either appealing the decisions of the Special Board of Adjustment or are accorded avenues of appeal under that administrative process.

9. The defendant's rules governing drug and/or alcohol tests have been unilaterally issued and implemented on the CNW and its predecessor companies since at least as early as 1910. General Rule H, effective September 1, 1910, appended as Exhibit 1 to the affidavit of Paul Lundberg, Vice-President of Labor Relations of the CNW [App. 281], was placed in effect unilaterally by the railroad and prohibited the use of intoxicants while on duty and frequenting of places where they were sold. When the rule was re-issued on December 1, 1929, as Rule 8, it was amended to also prohibit the use of narcotics while on duty or frequenting places where they are sold as shown by Exhibit 2 attached to Lundberg affidavit [App. 283]. The rule was again unilaterally amended on January 1, 1953, and was now identified as Rule G and prohibited the use of intoxicants or narcotics while subject to duty, that is, prior to reporting to work, and further prohibited possession even if not being used while on duty as shown by Exhibit 3 attached to Lundberg affidavit [App. 285]. On June 1, 1967, Rule G was unilaterally modified to prohibit employees from being under the influence of alcoholic beverages or narcotics while on duty or on company property and prohibited use or possession of alcoholic beverages or narcotics while on company property even though off-duty, such as at a lodging facility, as shown by Exhibit 4 to Lundberg affidavit [App. 287]. Rule G was again unilaterally amended in 1975 by expanding the group of drugs covered by the rule and setting forth the conditions under which certain prescription drugs may be used by employees as shown by Exhibit 5 to Lundberg affidavit [App. 289]. The 1975 addition to Rule G was again unilaterally modified on October 1, 1980, by including a prohibition against liquids containing alcohol as shown by Exhibit 6 to Lundberg affidavit [App. 291].

10. On March 17, 1987, CNW promulgated its alcohol and drug use policy ("ADU") which described the methods that CNW would use to enforce its rules and policies regarding prohibited alcohol and drug use. These methods included: (1) a codification of the enforcement of the provisions of Rule G and the medical examination and employee assistance referral programs that were a long-standing practice and already in effect; (2) refine the methods of enforcing Rule G by providing for breath and urine tests for alcohol and drugs in reasonable cause and reasonable suspicion situations where CNW had a basis for believing a violation of Rule G may be present; and (3) provided for incorporating a drug screen into the routine medical examination to determine an employee's fitness for service. Exhibit 7 attached to Lundberg affidavit is a copy of ADU policy issued on March 17, 1986 [App. 293]. On August 15, 1990, the CNW modified its Rule G to also prohibit the presence of alcoholic beverages and drugs in the body fluids of employees on duty or on company property as shown by Exhibit 8 to Lundberg affidavit [App. 300]. That rule now reads as follows:

> "The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Presence of any alcohol, intoxicants, narcotics, marijuana or other controlled substances in the body fluids of employees while on duty or on company property is considered possession and is prohibited.
>
> Employees must not report for duty with the presence in their body fluids of any medication, including those prescribed by a doctor, that may in any way adversely affect the safe performance of their duties. Employees who are prescribed any drug or medication by a licensed physician (1) the possession of which is prohibited by law; (2) which belongs to the generic categories of narcotics, depressants, stimulants,

tranquilizers, hallucinogens or antidepressants; (3) which is assigned a registration number by the U.S. Food and Drug Administration not included in (2); or (4) any liquid containing alcohol, must obtain from the treating physician a written statement (which upon request, will be submitted by the employee to his supervisor) certifying that in the physician's opinion the drug or medication prescribed at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties."

11. On August 15, 1990, CNW modified its ADU policy to provide an opportunity for employees who have been dismissed for Rule G for the first time and who have been diagnosed as drug abusers to be reinstated upon petition. It also provided for the employee assistance director to issue instructions to employees regarding the conditions that must be met in order to be qualified for service and to monitor that compliance in accordance with those instructions as shown in Exhibit 9 attached to Lundberg affidavit [App. 302]. On April 27, 1986, CNW unilaterally amended its Rule G to include a provision prohibiting off-duty drug use by its employees. That provision provided as follows:

"Employees subject to call for duty, reporting for duty, on duty or on company property are prohibited from using or being under the influence of alcoholic beverages or intoxicants. Possession of alcoholic beverages or intoxicants is prohibited while on duty or on company property.

Employees shall not report for duty, be on company property or be on duty under the influence of, or use while on duty or on company property any drug or other substance that may in any way adversely affect their alertness, coordination reaction, response or safety. This prohibition includes prescription medications.

The illegal use, illegal possession or illegal sale of any drug by employees while on or off-duty is prohibited."

12. Following substantial litigation, the matter was settled with CNW reinstating its Rule G that existed prior to April 27, 1986, as shown by the settlement and stipulation of voluntary dismissal filed in the United States District Court for the District of Minnesota in Case No. 4-86-575 attached as Exhibit 10 to Lundberg affidavit [App. 309].

13. Upon issuance of the ADU policy on March 17, 1987, plaintiff BMWE as well as the Railway Labor Executives Association and 15 other CNW unions representing CNW employees filed an action in the United States District Court for the Eastern District of Michigan, Southern Division, seeking to declare and enjoin CNW's ADU policy as a violation of the mandatory bargaining provisions (major dispute provisions) of the Railway Labor Act. This litigation was transferred to the United States District Court for the District of Minnesota, Third Division. Following a series of court decisions, including the Supreme Court decision in *Consolidated Rail Corporation v. RLEA,* 109 S.Ct. 2477 (1989), which held, among other things, that issues of drug and alcohol policies and testing were minor disputes under the Railway Labor Act, the BMWE for and on behalf of its members, including all plaintiffs in these cases, entered into a stipulation to dismiss and settlement agreement in that case which provided among other things that BMWE's remedies (including those of its members) regarding actions taken under or changes to the ADU and Rule G policies were governed exclusively by the provisions of Railway Labor Act grievance procedures, 45 U.S.C. Section 153, as required by the collective bargaining agreements and the Railway Labor Act. The stipulation for dismissal with prejudice and settlement agreement are set forth as Exhibit 12 to Lundberg affidavit [Respondent's App. 8-14; Iowa Supreme Court App. 331-338]:

> "2. CNW recognizes the right of the plaintiffs pursuant to Section 153 of the RLA, subject to the assertion by CNW of any defenses it may have, including but not limited to time limits

> and statute of limitations defenses, to submit and/or progress claims and grievances as to whether CNW's prohibited by its collective bargaining agreements, express or implied, from taking actions in regard to CNW employees under the ADU policy or CNW's Rule G (including but not limited to return to service drug/alcohol screening, disciplinary action or medical disqualifications) or from making changes to the ADU policy or Rule.
>
> 3. Plaintiffs recognize that the remedies under RLA Section 153 referred to in paragraph 2 of this agreement are exclusive, except that this settlement agreement shall not waive any rights any of the parties may have under the RLA to seek judicial enforcement of an arbitration award, should the party prevail in an arbitration permitted under this settlement agreement, nor shall this agreement operate as a bar to either party seeking to have any subsequent arbitration award set aside for any reasons set forth in 45 U.S.C. Section 153, first and second."

[End of Excerpt Iowa District Court Undisputed Relevant Material Facts]

In addition to the Iowa District Court Findings set out immediately above, CNW points the Court to these three additional facts. (1) By the time of the District Court's Ruling, the dismissal of Appellants Menter and Smith for violation of Rule G had been upheld by the Special Board of Adjustment No. 924 pursuant to the Railway Labor Act. (Affidavit of Joan Harvieux, Iowa Supreme Court App. 263; Exh. F. and G to Defendant's Motion for Summary Judgment in Menter and Smith v. CNW, Cerro Gordo District Court No. 52635-0491, Iowa Supreme Court App. 119 and 123, respectively). (2) 49 CFR Ch. II, Subpart D, 209.301 and 209.303 require determination of an employee's fitness to perform safety sensitive functions and designate Maintenance of Way employees as performing safety sensitive functions. (3) The CNW's Alcohol and Drug Use Policy ("ADU") provides that an employee discharged on a first violation for alcohol who accepts counseling and completes any recommended rehabilitation program

can petition for reinstatement to employee status; an employee found responsible and subsequently dismissed for use of an illegal drug will not be reinstated. (Respondent's App. 1-5; Lundberg Aff. Ex. 9, Iowa Supreme Court App. 302-305).

SUMMARY OF ARGUMENT

Railroads, such as the Chicago and North Western Transportation Company (CNW), have historically issued and enforced work rules prohibiting or restricting use of alcohol and drugs. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n.*, 491 U.S. 299, 312, 314-316, 318-320, 105 L.Ed.2d 250, 109 S.Ct. 2477 (1989); Iowa District Court Ruling, Petitioners' App. 19-24. For purposes of administration of the Railway Labor Act (RLA), 45 U.S.C. § 151, et seq., the authority of the CNW to administer drug tests to its employees is a "minor dispute" to be submitted to arbitration before the National Railroad Adjustment Board. *Id.* at 491 U.S. 318-320. In a Stipulation for Dismissal and Settlement Agreement in the United States District Court for the District of Minnesota, the petitioners agreed that the remedies under Section 153 of the RLA are exclusive for alcohol and drug disputes. (Respondent's App. 1-5; Iowa District Court Ruling, petitioners' App. 22-24, 38).

The Petitioner employees seek as damages the wages lost because of discharge from employment with the CNW or delay in returning to work after furlough. These actions were taken by the CNW because of its determination that the employees were not qualified to work either because of failing a drug test or not having yet taken a drug test. The Railway Labor Act preempts a state law wrongful discharge action based on a railroad's alleged state law obligation to reinstate an employee to his job with pay following his injury in an automobile accident. *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320, 324, 92 S.Ct. 1562, 1565, 32 L.Ed.2d 95 (1972). Where an employee is discharged for alleged violation of railroad safety rules, a state action for damages is preempted by the Railway Labor Act. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369-1370 (9th Cir. 1978); *Jackson v. Consolidated Rail*

Corp., 717 F.2d 1045, 1049-1051, 1056-1057 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed.2d 233 (1984).

The Federal Rail Safety Act of 1970 (F.R.S.A.) was enacted to promote railroad safety. 45 U.S.C. § 421. The Secretary of Transportation was given broad powers to issue regulations and standards for all areas of railroad safety. 45 U.S.C. § 431(a). However, the powers given to the Secretary were not intended to prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the RLA relating to qualifications of employees, which are not inconsistent with the Secretary's regulations. 45 U.S.C. § 431(a). The Federal Railroad Administration of the United States Department of Transportation issued regulations designating maintenance of way employees as performing safety sensitive functions. 59 C.F.R. § 209.301 and § 209.303. These regulations do not preempt a railroad from initiating disciplinary proceedings and imposing disciplinary sanctions against its employees under its collective bargaining agreements or in the normal and customary manner. 59 C.F.R. § 209.301(c).

Iowa Code § 730.5 is more restrictive than the CNW's alcohol and drug use policy as to circumstances in which the railroad may drug test an employee. The savings clause in 45 U.S.C. § 434 governing preemption of state rail safety regulations does not apply to Iowa Code § 730.5 since it is a general labor statute not directed toward rail safety. When the RLA and the F.R.S.A. are read together, the conflict with federal law created by enforcing Iowa Code § 730.5 is obvious and contrary to the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. The plan of Congress to leave determination of safety-related employee qualifications to regulation by the Secretary and to rail carriers and unions in their historical roles under collective bargaining agreements should not be frustrated by enforcement of a state general labor statute that is less stringent than railroad work rules affecting rail safety.

ARGUMENT

I. The Railway Labor Act and The Federal Rail Safety Act of 1970, Individually And When Read Together, Preempt Enforcement of Iowa Code § 730.5 Against the Chicago and North Western Transportation Company, a Rail carrier in Interstate Commerce.

The Iowa District Court ruled that Petitioners' claim alleging violation of Iowa Code § 730.5 is preempted by the Railway Labor Act, 45 U.S.C. §§ 151-188 (R.L.A.). The Iowa Supreme Court did not reach that issue since it ruled Petitioners' claim was preempted by the Federal Railroad Safety Act of 1970 (F.R.S.A.), 45 U.S.C. §§ 421-447. One thing is clear: when the R.L.A. and the F.R.S.A. are read together, the conflict with federal law created by enforcing Iowa Code § 730.5 against an interstate rail carrier is obvious and contrary to the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. Iowa Code, § 730.5, is a general labor statute never intended and not directed toward promoting railroad safety. The role of the R.L.A. in promoting railroad safety by controlling use of alcohol and drugs by railroad employees will be discussed first and its preemptive effect explained. Next, the F.R.S.A. will be discussed and its preemptive effect explained.

a. The Railway Labor Act.

45 U.S.C. § 153(i) provides that disputes between an employee and a rail carrier growing out of grievances or out of interpretation or application of agreements concerning rules or working conditions which are not resolved by agreement between the employee and the carrier may be referred by petition of either party to the National Railroad Adjustment Board. Awards of the Adjustment Board are final and binding upon both parties to the dispute. 45 U.S.C. § 153(m). An Adjustment Board award may be appealed to the United States District Court, but on review the findings and order of the Adjustment Board are conclusive and the award may be set aside only for failure of the Adjustment Board to comply with the requirements of 45 U.S.C. § 151-188, for failure of the

award to confine itself to matters within the occupational jurisdiction of the particular division of the Adjustment Board making the award, or for fraud or corruption by a member of the division making the order. 45 U.S.C. § 153(q).

The Union and employees' dispute with the CNW grows out of a grievance or interpretation or application of the collective bargaining agreement concerning rules or working conditions. *International Association of Machinists v. Central Air Lines, Inc.*, 373 U.S. 682, 692, 83 S.Ct. 956, 10 L.Ed. 2d 67, 75, rehearing denied, 373 U.S. 947, 83 S.Ct. 1533, 10 L.Ed. 2d 702 (1963), states:

> A union agreement made pursuant to the Railroad Labor Act has, therefore, the imprimatur of the federal law upon it. That is, the section 204 contract, like the Labor Management Relations Act Section 301 Contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts.

The employees seek as damages the wages lost because of discharge from employment with the CNW (Menter, Smith, Waldeier, Gildea and Scarberry) or delay in returning to work after furlough (Otis, Ewoldt, Cook, and Halladay). These are actions for wrongful discharge and state courts are without jurisdiction to entertain such an action brought by an employee against a rail carrier. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324-26, 92 S.Ct. 1562, L.Ed. 2d 95 (1972); *Swanigan v. Western Air Lines, Inc.*, 396 N.W.2d 607, 610-611 (Minn. App. 1986); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1054, 1056-57 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed. 2d 233 (1984); *Majors v. U. S. Air. Inc.*, 525 F. Supp. 853, 856-857 (D. Md. 1981); *Pandil v. Illinois Central Gulf Railroad Co.*, 312 N.W.2d 139, 141-144 (Iowa App. 1981); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369-1370 (9th Cir. 1978).

"A Plaintiff may not avoid the mandatory arbitration process by asserting a state cause of action. Artful pleading cannot

disguise what is truly a minor dispute under the RLA." *Santonti Roia v. Iberia Lineas Aereas De Espana,* 688 F. Supp. 810, 813 (D. Puerto Rico 1988).

The railroad employee in *Magnuson v. Burlington Northern, Inc.,* 576 F.2d 1367, 1369-1370 (9th Cir. 1978) was discharged as a result of a hearing on alleged railroad rules violations he committed in connection with a train collision. The employee claimed damages for emotional distress, and lost wages and benefits. He claimed his discharge from employment resulted because of a conspiracy among employees having evil motivations and wishing to cover up the guilty acts of other employees of the rail carrier. The *Magnuson* court held the employee's claim was a "minor dispute" within the exclusive province of the grievance mechanisms established by the Railway Labor Act. 576 F.2d 1369-1370. The employee's claim for lost wages and benefits resulted because of his discharge from employment, and the court also explained that the employee's alleged emotional distress damages likewise grew out of the fact he was allegedly wrongfully discharged. Reasoning that if the employee had not been discharged, or if his discharge was not wrongful, the railroad employee's alleged evil motivations would not create any legal injury, and thus the Court held that all of plaintiff's claims were for wrongful discharge and were preempted by the Railway Labor Act. 576 F.2d 1369-1370.

In *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed. 2d 233 (1984), the employee was discharged for violation of railroad safety rules. The 7th Circuit Court of Appeals held Plaintiff's claim fell within an area of inquiry preempted by the Railway Labor Act and dismissed Plaintiff's state law tort claim for lack of subject matter jurisdiction. 717 F.2d 1054, 1056-57. The Court in *Jackson* distinguished those few cases allowing an employee to pursue an action in court based on a specific *federal* statutory right without going to the National Railroad Board of Adjustment. The Court said those cases do not support the right of an employee to sidestep the Railway Labor Act when the employee is pursuing a claim based on a state statutory right. That court, dealing with

discharge for violation of railroad safety rules, held a state law right is not sufficient to rebut preemption by the Railway Labor Act. 717 F.2d 1049-1051.

For many years the Transportation Company has had in effect Rule G of the General Code of Operating Rules, or its predecessor rule. Rule G states:

> The use of alcoholic beverages, intoxicants, drugs, narcotics, marijuana or controlled substances by employees subject to duty, when on duty or on company property is prohibited. Employees must not report for duty, or be on duty or have in their possession while on company property, any drug, alcoholic beverage, intoxicant, narcotic, marijuana, medication, or other substance, including those prescribed by a doctor, that will in any way adversely effect their alertness, coordination, reaction, response or safety.

Further, Rule I of the General Code of Operating Rules provides:

> Employees must exercise care to prevent injury to themselves or others. They must be alert and attentive at all times when performing their duties and plain their work to avoid injury.

In *Consolidated Rail Corporation v. Railway Labor Executives' Association,* 491 U.S. 299, 105 L.Ed.2d 250, 109 S.Ct. 2477 (1989), a railroad unilaterally decided to require urinalysis drug screening as part of all periodic and return-from-leave physical examinations. This Court held that the Railway Labor Act (RLA), 45 U.S.C.A. 151, et seq., required employees disputing a railroad's unilateral decision on drug testing to pursue the dispute through the arbitration process set up by the RLA for determining "minor disputes". 491 U.S. at 320, 105 L.Ed.2d at 272.

In *Consolidated Rail,* an unincorporated association of the chief executive officers of 19 labor organizations which collectively represented the railroad's employees filed suit in the United States District Court for the Eastern District of Pennsylvania claiming that the railroad's unilateral announcement in 1987 that urinalysis drug screening would be hence forth

included as a part of all periodic and return-from-leave physical examinations was a "major dispute" and that the urinalysis drug screening therefore could not be implemented by the railroad unless it obtained the right to do so after going through the collective bargaining agreement process. This Court said at 491 U.S. 312:

> The essential facts regarding Conrail's past practices – the facts in support of the positions of both Conrail and the Union – are not disputed. Since its founding in 1976, Conrail routinely has required its employees to undergo physical examinations under the supervision of its Health Services Department. The parties agreed in the Court of Appeals, and the District Court found, that Conrail's authority to conduct physical examinations is an implied term of the collective-bargaining agreement, established by long-standing past practice and acquiesced in by the Union . . .

This Court explained at 491 U.S. 314-316:

> The problem of drug use has been addressed by Conrail not only as a medical concern, but also as a disciplinary one. The Court noted earlier in the present Term that the railroad industry has adopted operating "Rule G," which governs drug use by employees. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. ___, ___, 103 L.Ed.2d 63, 109 S.Ct. 1402 (1989). As currently implemented by Conrail, Rule G provides: "The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited. Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties." *See* App. 63. At Conrail, as elsewhere in the industry, an employee may be dismissed for violating Rule G. *Skinner,* 489 U.S., at ___, 103 L.Ed. 2d 639, 109 S.Ct. 1402; Tr. of Oral Arg. 43. Conrail has relied chiefly on supervisory observation to enforce Rule G. An employee suspected of drug or alcohol use is

encouraged voluntarily to agree to undergo diagnostic tests, but is not required to do so.

In addition, Conrail has implemented the Federal Railroad Administration regulations recently upheld in *Skinner* against a Fourth Amendment challenge. Since March 1986, Conrail has required all employees covered by the Hours of Service Act, 45 U.S.C. 61 et seq. [45 U.S.C.S. 61 et seq.], to undergo post-accident drug and alcohol testing, pursuant to 49 C.F.R. 219 et seq. (1988).

The dispute between the parties focuses on the meaning of these past practices. Conrail argues that adding urinalysis drug testing to its periodic and return-to-duty physicals is justified by the parties' implied agreement regarding physical examinations, as indicated by their long-standing practice of permitting Conrail unilaterally to establish and change fitness-for-duty standards, to revise testing procedures, and to remove from service employees who are deemed unfit for duty under those standards and testing procedures. Conrail contends, specifically, that past practice reflects that drug use has been deemed relevant to job fitness, and that Conrail's physicians have the discretion to utilize drug testing as part of their medical determination of job fitness. The expansion of drug testing in February 1987, Conrail argues, represents no more than a diagnostic improvement in its medical procedures, similar to diagnostic improvements Conrail unilaterally made in the past . . .

The Court continued at 491 U.S. 318-320:

Conrail's well-established recognition of the relevance of drug use to medical fitness substantially weakens the Union's claim that Conrail now, for the first time, is engaging in medical testing that reveals facts about employees' private off-duty conduct. Indeed, the fact that medical testing often detects physical problems linked to off-duty behavior makes it difficult to draw a bright line for jurisdictional

> purposes between testing which does and that which does not reflect upon private conduct . . .
>
> The fact that for drug problems, unlike other medical conditions, Conrail's standards include a fixed time period in which the employee's condition must improve, does serve to distinguish Conrail's drug policy from its response to other medical problems. Conrail has argued that it needs, for medical purposes, to require employees who deny that they are drug-dependent to demonstrate that they are capable of producing a drugfree sample at will. Tr. of Oral Arg. 13. In our view, that argument has sufficient merit to satisfy Conrail's burden of demonstrating that its claim of contractual entitlement to set a time limit for successful recovery from drug problems is not frivolous.
>
> Because we conclude that Conrail's contractual arguments are not obviously insubstantial, we hold that the case before us constitutes a minor dispute that is within the exclusive jurisdiction of the Board.

As a matter of common sense the experienced railroad personnel representing both labor and management on the arbitration panels should determine whether a railroad's rules and working conditions relating to alcohol and drugs are proper and justify employees' discharge from or delay of employment. The parties in the present case even stipulated in an earlier lawsuit that the RLA, 45 U.S.C. § 153, provides the exclusive remedy for alcohol and drug disputes. (Respondent's App. 1-5; Lundberg Affidavit, Exh. 10, 11 and 12, Iowa Supreme Court App. 309, 311 and 331, respectively; Iowa District Court Ruling, Findings of Fact, ¶¶ 12 and 13, pp 7-8, Petitioner's App. 22-24). The Iowa District Court Ruling states (Petitioner's App. 38):

> The parties have agreed in the settlement agreements in the Minnesota district court that plaintiffs recognize that the remedies under RLA Section 153 are exclusive based upon the United States Supreme Court's recent holding in the *Consolidated Rail* case.

That settlement agreement ended litigation between the CNW and the Brotherhood of Maintenance of Way Employees that

had been commenced in the U.S. District Court for the Eastern District of Michigan and later transferred to the U.S. District Court for the District of Minnesota. The settlement agreement provided:

> 2. CNW recognizes the right of the plaintiffs pursuant to Section 153 of the RLA, subject to the assertion by CNW of any defenses it may have, including but not limited to time limits and statute of limitations defenses, to submit and/or progress of claims and grievances as to whether CNW is prohibited by its collective bargaining agreements, express or implied, from taking actions in regard to CNW employees under the ADU policy or CNW's Rule G (including but not limited to return to service drug/alcohol screening, disciplinary action or medical disqualifications) or from making changes to the ADU policy or Rule G.
>
> 3. Plaintiffs recognize that the remedies under RLA Section 153 referred to in paragraph 2 of this agreement are exclusive, except that this settlement agreement shall not waive any rights any of the parties may have under the RLA to seek judicial enforcement of an arbitration award, should the party prevail in an arbitration permitted under this settlement agreement, nor shall this agreement operate as a bar to either party seeking to have any subsequent arbitration award set aside for any reasons set forth in 45 U.S.C. Section 153, first and second.

Iowa recognizes the doctrine of *Res Judicata. Goolsby v. Derby,* 189 N.W.2d 909, 913-914 (Iowa 1971); *B&B Asphalt Co. v. T.S. McShane Co.,* 242 N.W.2d 279, 286 (Iowa 1976). However, this defense was not ruled upon by the Iowa District court or the Iowa Supreme Court since they ruled in favor of the CNW on the basis of federal preemption. Nevertheless, it stands as a reason these Petitioners should not be granted a writ of certiorari.[1]

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[1] The employee Petitioners derive any rights they have to employment, pay and benefits from the Collective Bargaining Agreement negotiated by their union,

The Secretary has known that rail carriers, unions and employees have been operating under the carriers' work Rule G and dealing with drug testing issues under the RLA arbitration provisions governing minor disputes. The Secretary issued regulations requiring the determination of an employee's fitness to perform safety-sensitive functions (which include maintenance of way functions). 49 C.F.R. Ch. II, Subpart D, § 209.301 and 209.303. The Secretary specifically provided in § 209.301(c) that rail carriers could continue to discipline employees for violations of work rules:

> This subpart does not preempt a railroad from initiating disciplinary proceedings and imposing disciplinary sanctions against its employees, including managers and supervisors, under its collective bargaining agreements or in the normal and customary manner. Disqualification determinations made under this subpart shall have no effect on prior or subsequent disciplinary actions taken against such employees by railroads.

Thus, the Secretary's own regulations on disqualifications of employees for safety reasons provide they are not to impinge on the carriers' own efforts through work rules and collective bargaining agreements to promote safety by disciplinary action against employees. This is a clear recognition of Congress' obvious intent expressed in 45 U.S.C. § 431(a), and the absence of amendment to the Railway Labor Act, that rail carriers continue addressing safety precautions through Railway Labor Act administrative proceedings. There is no reason

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the BMWE. While in this case the employees are in privity with the BMWE, privity is not even required where, as here, issue preclusion is raised defensively against parties so connected in interest with a party in the former action as to have had full and fair opportunity to litigate the relevant issue. *In the Matter of Evans,* 267 N.W.2d 48 (Iowa 1978). All the railroad unions litigated this issue in the former action on behalf of their members, including the members of the Petitioner employees' union, the BMWE. Since the defendant in this action has raised the defense of *Res Judicata,* Petitioners should not be permitted to relitigate this issue which has been thoroughly treated and disposed of in the much more intensive earlier case commenced in Michigan and transferred to the United States District Court for Minnesota.

to believe Congress intended to permit a State's general labor statute (not specifically addressing rail safety) to undermine a rail carriers' efforts to promote rail safety through work rules subject to challenge and review under the Railway Labor Act.

The Railroad should not be required to have different work rules and working conditions relating to drugs and alcohol in different states when the Railway Labor Act contemplates arbitration of such work rules and working conditions in a manner that provides relative uniformity of decisions.

b. The Federal Rail Safety Act of 1970.

Congress enacted the F.R.S.A. "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons . . . " 45 U.S.C. § 421; *CSX Transportation, Inc. v. Easterwood,* 113 S.Ct. 1732, 1736, ___ U.S. ___, 123 L.Ed.2d 387 (1993). This Court in *CSX Transportation,* at 113 S.Ct. 1736-1737 further explained:

> In addition, the Secretary is given broad powers to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . . " Sec. 431(a). The pre-emptive effect of these regulations is governed by Sec. 434, which contains express saving and pre-emption clauses. Thus, the States are permitted to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." Even after federal standards have been promulgated, the States may adopt more stringent safety requirements "when necessary to eliminate or reduce an essentially local safety hazard," if those standards are "not incompatible with" federal laws or regulations and not an undue burden on interstate commerce.

As the Iowa Supreme Court observed in its April 20, 1994, Amendment (Petitioner's App. 13-14) to its March 23, 1994 Opinion, Iowa Code § 730.5 is a general labor statute and not a

state railroad safety regulation. The 45 U.S.C. § 434 savings clause therefore does not catch § 730.5. In fact, it will be seen the enforcement of § 730.5 against the CNW results in blocking discipline of railroad employees that is sanctioned by the R.L.A. and the F.R.S.A. as a means of promoting safety by deterring alcohol and drug use in safety sensitive positions.

The Federal Railroad Administration of the United States Dept. of Transportation has designated Maintenance of Way employees as performing safety sensitive functions. 59 C.F.R. Ch. II, Subpart D, 209.301 and 209.303 provides:

> § 209.301
>
> (a) This subpart prescribes the rules of practice for administrative proceedings relating to the determination of an individual's fitness for performing safety-sensitive functions under 209(f) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 438(f)).
>
> (b) The purpose of this subpart is to prevent accidents and casualties in railroad operations that result from the presence in the work force of railroad employees, including managers and supervisors, and agents of railroads who have demonstrated their unfitness to perform the safety-sensitive functions described in 209.303 by violating any rule, regulation, order or standard prescribed by FRA. Employees and agents who evidence such unfitness may be disqualified, under specified terms and conditions, temporarily or permanently, from performing such safety-sensitive functions.
>
> (c) This subpart does not preempt a railroad from initiating disciplinary proceedings and imposing disciplinary sanctions against its employees, including managers and supervisors, under its collective bargaining agreements or in the normal and customary manner. Disqualification determinations made under the subpart shall have no effect on prior or subsequent disciplinary actions taken against such employees by railroads.
>
> § 209.303 coverage.
>
> (a) Railroad employees who are assigned to perform service subject to the Hours of Service Act (45

U.S.C. 61-64b) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service.

(b) Railroad employees or agents who:

(1) Inspect, install, repair or maintain track and roadbed;

(2) Inspect, repair or maintain locomotives, passenger cars, and freight cars;

(3) Conduct training and testing of employees when the training or testing is required by the FRA's safety regulations; or

(c) Railroad managers, supervisors or agents when they:

(1) Perform the safety-sensitive functions listed in paragraphs (a) and (b) of this section;

(2) Supervise and otherwise direct the performances of the safety-sensitive functions listed in paragraphs (a) and (b) of this section; or

(3) Are in a position to direct the commission of violations of any of the requirements of parts 213 through 236 of this title.

Hawaiian Airlines, Inc. v. Norris, 114 S.Ct. 2239, 2247-50, ___ U.S. ___ (June 20, 1994), this Court's most recent case addressing the issue of preemption of state law claims by the Railway Labor Act, was a retaliatory discharge case. The employee aircraft mechanic refused to sign a work record indicating a repair had been performed satisfactorily because it was his opinion additional work that was required to ensure safety had not been completed. The question under the state law claim was whether the employers' motive in discharging the employee was to deter or interfere with his exercise of rights under Illinois workers' compensation law. 114 S.Ct. at 2248.

Retaliatory discharge is not at issue in the present case. In this case, the CNW, and federal law, are attempting to set requirements that promote national railroad safety under both

the Railway Labor Act and the Federal Rail Safety Act of 1970, while the effect of Iowa Code § 730.5 in this limited factual arena is to water down those efforts towards safety. In *Hawaiian Airlines,* the effect of the employee prevailing on his state law claim would be to enhance airline safety. *Missouri Pacific R. Co. v. Norwood,* 283 U.S. 249, 258, 51 S.Ct. 458, 462, 75 L.Ed. 1010 (1931) and *Terminal Railroad Ass'n of St. Louis v. Brotherhood of Railroad Trainmen,* 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571 (1943), cases denying federal preemption, each involved state laws promoting workplace safety.

However, in *Andrews v. Louisville & N.R. Co.,* 406 U.S. 320, 324, 92 S.Ct. 1562, 1565, 32 L.Ed.2d 95 (1972), the question was the extent to which the railroad was obligated to reinstate the employee in his job with pay following his injury in an automobile accident. The court in *Andrews* determined that the extent of any such obligation on the part of the railroad depended upon interpretation of the collective bargaining agreement and held that therefore the state law wrongful termination claim was preempted by the Railway Labor Act. In the present case railroad employees have had an historical obligation under their collective bargaining agreements to comply with certain work rules governing alcohol and other drugs and to submit to discipline under their CBA (subject to procedural protections of the Railway Labor Act for violation of such rules). *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n,* 491 U.S. 299, 312-20, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989). (Iowa District Court Ruling, Petitioners' App. 19-24; Lundberg Aff., Iowa Supreme Court App. 267-274.)

Iowa Code § 730.5 is more restrictive than the CNW's alcohol and drug use policy as to circumstances in which the railroad may drug test an employee. For example, the CNW drug tests an employee after any accident, injury, rule violation, or unsafe act "in which human error may reasonably have been a factor . . . " (Respondents' App. 1-5; Lundberg Aff., Ex. 9; Iowa Supreme Court App. 302-304.) Section 730.5(3)(a) permits testing only where "The employer has probable cause to believe that an employee's faculties are impaired on the job." Further, § 730.5(3)(f) permits a drug test under the above circumstance only if the employer takes no disciplinary action

against an employee on account of his first discovered drug involvement if the employee undergoes substance abuse evaluation and treatment. The CNW does discipline employees on a first discovered drug involvement, but in cases not involving illegal drugs allows them to complete recommended evaluation and treatment and petition for reinstatement.

Congress recognized that rail carriers historically had promoted safety under collective bargaining agreements by using safety as a factor in determining qualifications for employees. It therefore provided in 45 U.S.C. § 431(a):

> . . . However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act [45 U.S.C.A. Sec. 151 et seq.], including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be construed to give the Secretary authority to issue rules, regulations, orders, and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

The plan of Congress to leave determination of safety related employee qualifications to regulation by the Secretary and to rail carriers and unions in their historical roles under CBA's should not be frustrated by enforcement of a state general labor statute that is less stringent than railroad work rules affecting rail safety.

CONCLUSION

The Ruling of the Iowa Supreme Court is not in conflict with the decision of another state court of last resort or of a United States Court of Appeals. Nor does the Ruling decide an important federal question that has not been settled by this Court or conflict with applicable decisions of this Court. Iowa Code § 730.5, a state general labor statute, should not be enforced to require less stringent standards for drug and alcohol testing than permitted under the Federal Rail Safety Act of

1970 and subject to challenge and review under the Railway Labor Act.

WHEREFORE, Respondent Chicago and North Western Transportation Company prays that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

EXHIBIT 9

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ALCOHOL AND DRUG USE POLICY

The Chicago and North Western Transportation Company is committed to maintaining a safe working environment and to promoting productivity by ensuring that its employees are drug-free and do not abuse alcohol. The company has three programs for that purpose applicable to all employees, including officers and employees whose positions are covered by collective bargaining agreements: (a) the Rule "G" Program, (b) the Employee Assistance Program, and (c) and Medical Examination Program.

1. THE RULE "G" PROGRAM

The Company requires all employees, including officers and employees whose positions are covered by collective bargaining agreements, to comply with the provisions of the applicable General Rule "G". Employees covered by the Hours of Service Act shall also be governed by the FRA Rule on Control of Alcohol and Drug Use in Railroad Operations.

(a) Testing – Reasonable Cause

Whenever an employee is involved in an accident, an on-the-job injury, a rule violation, or an unsafe act, in which human error may reasonably have been a factor, a supervisor may require the employee to submit to a urine and/or breath test. When an employee working as part of a crew, a gang, or a group of employees is

involved in an accident, an on-the-job injury, a rule violation, or an unsafe act, a supervisor may require some or all members of the employee's group to submit to a urine and/or breath test if, but only if, individual responsibility is not clear and human error by the other employees required to submit to the test may reasonably have been a factor. An employee's refusal to take the test will be handled under the discipline system as an act of insubordination.

(b) Testing – Reasonable Suspicion

Whenever a supervisor has reasonable grounds to suspect that an employee is violation Rule "G" (two or more supervisors when drugs are involved), the supervisor may require the employee to submit to a urine and/or breath test. If an employee is suspected of using alcohol, breath testing is the preferred means of confirmation. If the employee refuses the test, the supervisor will utilize physical observation and/or other evidence to determine if the employee should be charged with a violation of rule "G". The refusal of the employee to take the applicable test will be handled under the discipline system as an act of insubordination.

(c) G.C./M.S. Test

For the purpose of determining the presence of prohibited substances, the Company will act only upon the results of a gas chromatography/mass spectrometry test performed by a reputable independent laboratory.

(d) FRA Testing Procedures

Employees covered by the Hours of Service Act shall also be governed by the testing provisions of the above-mentioned FRA Rule.

(e) Discipline

Any employee found responsible for violation of rule "G" will be subject to dismissal.

(f) Medical Disqualification

If a test discloses the presence of prohibited substances under circumstances that do not constitute a violation of Rule "G", the Company may medically disqualify the employee until an evaluation is completed to determine whether or not the employee has a drug and/or alcohol problem. If a drug and/or alcohol problem is diagnosed, the Medical Director will then determine if the alcohol and/or drug problem is under control before medically qualifying the employee to return to work.

(g) Blood Tests

Whenever (1) the Company requires an employee to submit to a urine test or (2) a breath test is positive, the Company will afford the employee an opportunity to provide a concurrent blood sample. If the employee declines to submit a blood sample and if the employee's urine sample discloses the presence of a prohibited substance, the Company will presume that the employee was under the influence of that

substance while on duty or on Company property within the meaning of Rule "G".

(h) Reinstatement

Any employee dismissed from service for using alcohol in violation of Rule "G" who wishes to be considered for reinstatement must first contact the Employee Assistance Program counselor for an interview and then must comply with the counselor's recommendations and instructions. If there is no diagnosis of alcohol abuse in the case, the employee, upon the expiration of one year, may petition the Company for a leniency reinstatement. The Company will consider that petition in light of all relevant factors including the employee's prior record. An employee violating Rule "G" for a second time (whether diagnosed as an alcohol abuser or not) will not be considered for a leniency reinstatement.

(i) Reinstatement – Alcohol Abusers.

If the counselor has diagnosed the employee as an alcohol abusers [sic], the employee must complete medical treatment to the satisfaction of the Employee Assistance Program and maintain abstinence, and the Medical Department after examination must reasonably believe that the employee has control of the employee's alcohol problem, before the employee may petition the Company for a leniency reinstatement. The company will consider that petition in light of all relevant factors.

(j) No Reinstatement – Drug Offenses

The Company will not consider for reinstatement an employee who has been found responsible and subsequently dismissed for drug-related violation of a Company rule or for insubordination arising from a refusal to take a required test.

(k) Prescription Drugs

If a test discloses the presence of a medication which might adversely affect an employee's alertness, coordination, reaction, response or safety and which the employee was taking pursuant to a physician's prescription, the employee shall be held responsible for violation of Rule "G" unless the employee has previously notified the appropriate supervisor and has presented that supervisor with a letter from a physician stating that the physician believes that the medication will not adversely affect the employee's alertness, coordination, reaction, response or safety. If the Company, after a thorough review of the matter, does not accept the physician's opinion, the company may medically disqualify the employee until it is medically appropriate for the employee to discontinue the medication.

2. THE EMPLOYEE ASSISTANCE PROGRAM

The Company maintains an active Employee Assistance Program, consisting of three parts: (a) voluntary referral, (b) co-worker report referral, and (c) management referral.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

RAILWAY LABOR EXECUTIVES' ASS'N, ET AL., *Plaintiffs,* v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *Defendant.*	Case No. 3-88-409 Hon. Edward J. Devitt

STIPULATION FOR DISMISSAL WITH PREJUDICE

(Filed July 21, 1990)

The above-entitled action having been settled (see Exhibit A attached hereto),

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, through their respective counsel, that this action against the Chicago & North Western Transportation Company be and hereby is dismissed with prejudice and on the merits, but without further costs to any of the parties.

IT IS FURTHER STIPULATED AND AGREED, that this dismissal with prejudice shall not operate as a bar to any rights any party may have with respect to seeking enforcement of a subsequent arbitration award relating to the subject matter of this litigation; nor shall this dismissal with prejudice operate as a bar to either party

seeking to have any subsequent arbitration award set aside for any reason set forth in 45 U.S.C. § 153 First and Second.

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Date: July 27, 1990

Attorneys for Plaintiffs

SHEA & GARDNER

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(202) 828-2000

Date: July 27, 1990

Attorneys for Defendant

Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

RAILWAY LABOR EXECUTIVES' ASS'N, ET AL., *Plaintiffs,* v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *Defendant.*	Case No. 3-88-409 Hon. Edward J. Devitt

SETTLEMENT AGREEMENT

Recitals.

A. Plaintiffs commenced an action against the Chicago & North Western Transportation Company ("C&NW") seeking declaratory and injunctive relief. Plaintiffs sought a declaration that C&NW's addition of a drug/alcohol screening component to its physical examinations and other aspects of C&NW's Alcohol and Drug Use Policy ("ADU Policy") gave rise to a major dispute under the Railway Labor Act ("RLA") over which the parties were obligated to bargain. Pending resolution through such bargaining, the plaintiffs sought a status quo injunction prohibiting C&NW from implementing its ADU Policy.

B. C&NW denies the allegations that the drug/alcohol screening addition or other aspects of the ADU policy presented major disputes requiring bargaining.

C. On June 19, 1989, the United States Supreme Court issued its opinion in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989), addressing some or all of the issues between the parties.

D. C&NW and Plaintiffs hereby advise the Court that they have agreed to settle Case No. 3-88-409. Based on the terms of this Settlement Agreement, Plaintiffs hereby request this Court to enter an order dismissing Case No. 3-88-409.

E. To settle this litigation, the parties have agreed to the terms set forth below.

Agreement.

The parties, by mutual promises, and desiring to be legally bound, agree as follows:

1. Plaintiffs shall agree to dismiss the pending litigation with prejudice and on the merits. Concurrent with the execution of this Settlement Agreement, the parties will execute and file with the Court a Stipulation for Dismissal with Prejudice.

2. C&NW recognizes the right of the Plaintiffs pursuant to section 153 of the RLA, subject to the assertion by C&NW of any defenses it may have, including but not limited to time limits and statutes of limitations defenses, to submit and/or progress claims and grievances as to whether C&NW is prohibited by its collective bargaining agreements, express or implied, from taking actions in

regard to C&NW employees under the ADU Policy or C&NW's Rule G (including but not limited to return-to-service drug/alcohol screening, disciplinary action or medical disqualifications) or from making changes to the ADU Policy or Rule G.

3. Plaintiffs recognize that the remedies under RLA § 153 referred to in Paragraph 2 of this Agreement are exclusive, except that this Settlement Agreement shall not waive any rights any of the parties may have under the RLA to seek judicial enforcement of an arbitration award, should the party prevail in an arbitration permitted under this Settlement Agreement, nor shall this agreement operate as a bar to either party seeking to have any subsequent arbitration award set aside for any reason set forth in 45 U.S.C. § 153 First and Second.

4. All parties shall bear their own costs of this litigation.

This Settlement Agreement entered into this 27th day of July, 1990.

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Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,

Plaintiffs,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,

Defendant.

_____/

Case No. 4-86-575

Hon. James J. Rosenbaum

SETTLEMENT AND STIPULATION OF VOLUNTARY DISMISSAL

Pursuant to Federal Rule of Civil Procedure 41, Plaintiffs hereby voluntarily dismiss the Complaint and Amended Complaint in this matter without prejudice, each side to bear its own costs, in consideration of the following settlement:

1. Defendant Chicago & North Western Transportation Company ("C&NW") will withdraw the version of Rule G promulgated on April 27, 1986 ("New Rule G") and will reinstate the version of Rule G in effect immediately prior to April 27, 1986 ("Former Rule G").

2. C&NW will not attempt to reinstitute the off-duty, off-company property proscription of "New Rule G," except through procedures under §6 of the Railway Labor Act, 45 U.S.C. §156, or as otherwise provided for by law or regulation. This agreement does not limit the

carrier's right to take any action permitted by Former Rule G, including the right to discipline employees for conduct on duty or on company property, or for coming onto duty or ont [sic] company property, in circumstances that would violate Former Rule G.

3. All pending discipline cases under "New Rule G" will be processed as if they arose under "Former Rule G." If there are any non-operating employes who have been disciplined under "New Rule G" for off-duty, off-property use, possession, or sale of illegal drugs and whose disciplines have been sustained solely on that ground by adjustment boards under §3 of the Railway Labor Act, the parties will resubmit those employees' claims to such boards for reconsideration under "Former Rule G."

KLIMIST, McKNIGHT, SALE &
McCLOW, P.C.

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Dated: 1/27/89

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Dated: 1/31/89

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Dated: February 15, 1989

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Dated: February 12, 1989